



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2005

Mr. John T. Patterson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2005-04821

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 225371.

The Waco Police Department (the "department") received several requests from two requestors for information concerning an investigation of alleged abuse of a named nursing home resident. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information that other statutes make confidential. You contend that the submitted information is excepted under section 552.101 in conjunction with section 242.127 of the Health and Safety Code, which pertains to investigations of alleged or suspected abuse or neglect in convalescent or nursing homes and related facilities. Section 242.127 provides in pertinent part:

A report, record, or working paper used or developed in an investigation made under [subchapter E of chapter 242] . . . [is] confidential and may be disclosed only for purposes consistent with the rules adopted by the [Texas Board of Human Services] or the designated agency.

Health & Safety Code § 242.127. The only entities authorized to conduct an investigation under subchapter E of chapter 242 are the Texas Department of Aging and Disability Services ("DADS") or the agency designated by a court to be responsible for the protection of a nursing home resident who is the subject of a report of abuse or neglect. *See id.* § 242.126; *see also id.* § 242.121 (defining "designated agency"). The submitted documents

include a copy of the investigative report completed by DADS concerning the alleged abuse at issue. We agree that this report, which we have marked, is confidential under section 242.127 of the Health and Safety Code and must be withheld under section 552.101.

We further find, however, that the remainder of the submitted information consists of investigative records used or developed by the department in the course of its own criminal investigation of the alleged abuse. While section 242.135 of the Health and Safety Code provides that a local law enforcement agency such as the department shall jointly investigate a report of abuse or neglect with DADS or a designated agency under certain circumstances, you do not indicate nor do the documents reflect that the department conducted a joint investigation with such agencies in this case. *See id.* § 242.135.

Based on your representations and our review of the remaining submitted documents, we find that the remaining documents do not consist of records of an investigation conducted under chapter 242. We therefore determine the remaining records are not confidential under section 242.127 and may not be withheld under section 552.101 on that basis.

You also contend that the submitted information is confidential under section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101. The only entities authorized to conduct an investigation under chapter 48 of the Human Resources Code are the Department of Protective and Regulatory Services and certain other state agencies, depending on the circumstances surrounding the incident. *See* Hum. Res. Code §§ 48.151, 48.152, 48.252, 48.301. Thus, records of a police

department investigation generally are not subject to section 48.101. As noted, the remaining records reflect that they were created by the department pursuant to the department's own investigation of an alleged crime. We determine that the submitted police investigation records were not used or developed in an investigation made under chapter 48 of the Human Resources Code. Accordingly, we determine that no portion of the remaining submitted information may be withheld under section 552.101 in conjunction with section 48.101 of the Human Resources Code.

Next, we note that the submitted documents include medical records, access to which is governed by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

In this case, you inform us that the patient at issue is deceased. Medical records pertaining to a deceased individual may be released only on the signed consent of the personal representative of the deceased. Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005.

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked medical records that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Finally, we note that in your first submission to this office regarding this request, the department argued that portions of the submitted incident report are protected by privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To the extent the department contends that portions of the remaining submitted information are protected from disclosure on the basis of the patient's privacy interests, however, we note that the right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Accordingly, none of the remaining submitted information may be withheld under section 552.101 pursuant to common-law privacy.

In summary, the report of the DADS investigation of the alleged abuse at issue is confidential under section 242.127 of the Health and Safety Code. The department must withhold this report, which we have marked, under section 552.101 of the Government Code. The medical records we have marked in the submitted documents may only be released as provided under the MPA. The remainder of the submitted information is not excepted from disclosure and must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 225371

Enc. Submitted documents

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